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Supreme Court, U.S.
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No. 85-1947

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM 1985

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WILLIAM I. KAUFMAN, *Petitioner,*
*v.*
McCRORY STORES DIVISION OF McCRORY CORP. (N.Y.) sub. of RAPID-AMERICAN CORP. (Del.); HELENA L. BOWES, Individual; GEIGER and LORIA REPORTING SERVICE, INC. (Penna.),
*Respondents.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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# BRIEF IN OPPOSITION OF RESPONDENTS McCRORY CORPORATION AND RAPID-AMERICAN CORPORATION

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## QUESTIONS PRESENTED

1. Whether a privately employed stenographer who is also a notary public acts under color of state law when she records and transcribes the deposition of witnesses as part of the discovery process in a civil action.

2. Whether private persons, none of whom is a state official or who acts under color of state law, can be liable under 42 U.S.C. §1983 upon allegations that they conspired with a privately employed stenographer to alter deposition transcripts in a civil action.

## PARTIES TO THE PROCEEDING

In the District Court, Petitioner's complaint named as defendants: (1) McCrory Stores Division of McCrory Corporation, (2) McCrory Corporation, (3) Rapid-American Corporation, (4) Helena L. Bowes, and (5) Geiger and Loria Reporting Service, Inc.

McCrory Stores Division of McCrory Corporation was and is a division of McCrory Corporation. McCrory Stores is not an entity capable of being sued. In the District Court, McCrory Corporation and Rapid-American Corporation filed answers to the complaint. Rapid-American Corporation owns all the common stock of McCrory Corporation and is its parent. The common stock of Rapid-American Corporation is privately held.

Respondents are: (1) Bowes, a stenographer employed by respondent Geiger and Loria Reporting Service, Inc., (2) Geiger and Loria Reporting Service, Inc., (3) McCrory Corporation, and (4) Rapid-American Corporation.

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# BRIEF IN OPPOSITION OF RESPONDENTS McCRORY CORPORATION AND RAPID-AMERICAN CORPORATION

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Respondents McCrory Corporation ("McCrory") and Rapid-American Corporation ("Rapid") respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Third Circuit's Order dated April 1, 1986, affirming without opinion the judgment of the United States District Court for the Middle District of Pennsylvania dated July 25, 1985, which granted a motion by respondents McCrory and Rapid for judgment on the pleadings and granted a motion by respondents Bowes and Geiger and Loria Reporting Service, Inc. to dismiss the complaint for failure to state a claim. The District Court's opinion is reported at 613 F.Supp. 1179. The Third Circuit's order of affirmance is as yet unreported.

The Petition should be denied because there is no conflict between the decisions of this Court and that of the Courts below or between different federal circuit courts or between this Court and the highest court of a State. The issues do not reach any level of national or constitutional importance and do not merit review by this Court. Petitioner's grievence simply fails to give rise to any actionable claim under the Civil Rights Act, 42 U.S.C. §1983, because no person acting under color of state law deprived Petitioner of any federally protected right.

## STATUTE INVOLVED

### Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

In 1982, Petitioner, a manufacturers' representative, commenced an action in the Court of Common Pleas, Allegheny County, Pennsylvania, against Penn Needle Art Co., as sole defendent, for alleged loss of past and future commissions. In the course of that action, Petitioner caused depositions to be taken of two employees of the McCrory Stores division of McCrory as non-party witnesses. The stenographer-reporter at these depositions was respondent Bowes, who was employed by respondent Geiger and Loria Reporting Sevice, Inc. and whose services were paid for by Petitioner. In addition to being a stenographer-reporter, Bowes was also a Pennsylvania Notary Public. Petitioner believed that in the preparation of

the transcripts, Bowes made omissions and changed the oral testimony, that the two employees of McCrory Stores lied at their depositions, and that they and their employer, McCrory, and their employer's parent corporation, Rapid, conspired with Bowes. Petitioner moved in the state court action to strike such portions of the deposition transcripts as he claimed were wrongfully transcribed. His motion was denied by the state court, from which denial no appeal was taken. Petitioner did not seek to take further depositions of the witnesses. Petitioner then voluntarily settled his state court action with Penn Needle Art Co. for $24,500, while believing that his claim against Penn Needle was worth $250,000.

On April 18, 1985, he filed his complaint in the District Court, invoking jurisdiction under 42 U.S.C. §1983, and asserting that he sustained damages (presumably the difference between $24,500 and $250,000) because the respondents allegedly violated his civil rights under 42 U.S.C. §1983 by depriving him of property in violation of the Fourteenth Amendment's guarantee of due process of law. To satisfy the "State action" requirement, Petitioner claims that Bowes, the privately employed stenographer, was a state actor because she was a notary public licensed as such by the Commonwealth of Pennsylvania. While asserting in conclusory terms that all the respondents "conspired," Petitioner's complaint alleged no direct overt acts of Geiger and Loria, the employer of Bowes, nor of McCrory, the employer of the two witnesses who were deposed in Petitioner's state court action, nor of Rapid, the parent of McCrory. Presumably, Petitioner's theory as to the corporate respondents was that they are liable on the principle of *respondeat superior* or that they conspired with Bowes, who as the stenographic reporter, was acting under color of state law.

The District Court held that the stenographer, who happened to be a notary public licensed by Pennsylvania, was not a state official who acted under color of state law for purposes of 42 U.S.C. §1983 when she recorded and transcribed the deposition testimony.

The District Court's determination, affirmed without

opinion by the Third Circuit, was that the stenographer was not a person acting under color of state law because her assignment as a stenographer, an occupation not licensed by Pennsylvania, entailed functions and obligations in no way dependent upon state authority. Bowes' acts of allegedly altering and omitting portions of transcripts were acts committed in the course of her assignment as a stenographer and not as a notary public. Whether acts of malfeasance by a notary in the exercise of her obligations as a notary could be deemed acts of a person under color of state law was not an issue presented by the allegations of the complaint. Since none of the defendants was a person acting under color of state law, none could be liable under §1983 directly or on theories of *respondeat superior* or conspiracy.

## REASONS WHY THE PETITION SHOULD BE DENIED

### A. THE ISSUES RAISED IN THE PETITION ARE NOT IMPORTANT ENOUGH TO WARRENT SUPREME COURT REVIEW.

Whether a state court litigant has a federal cause of action against a privately employed stenographer under 42 U.S.C. §1983 for alleged alteration of deposition transcripts is an issue with only academic relevance. Aggrieved litigants have adequate remedies through additional or alternative discovery proceedings within the state judical system. State discovery proceedings already incorporate various sanctions and remedies for the conduct about which Petitioner complains. For this reason, among others, there is no conflict between the decisions of this Court and that of the Courts below, or between different federal appeals courts, or between this Court and the highest court of the State.

A litigant who claims that a stenographer has improperly transcribed deposition testimony can, very simply, request another deposition before a stenographer of his own choosing. If necessary, he can request the judiciary to intervene in and oversee discovery proceedings. In the instant case, Petitioner has merely claimed that questions and answers were altered or

omitted from the transcripts. His remedy should have been to request another deposition or to appeal from the state court's denial of his motion to strike objectionable portions of the transcripts. Instead, Petitioner settled his state court lawsuit for $24,500 and instituted a federal action in an attempt to supplement the amount he received in the state court settlement.

It is unquestioned that none of the respondents did or is charged with doing any act that deprived Petitioner of his rights under Pennsylvania law to notice further depositions of the witnesses, or to appeal from the state court's denial of his motion to strike portions of the transcripts, or to refuse to settle with his former employer for what he claims is an inadequate sum. It is thus obvious that no respondent committed any act which deprived Petitioner of his right to due process, the second of the two elements of a §1983 action.[1]

B. THE ACTS OF A PRIVATELY EMPLOYED STENOGRAPHER WHO IS ALSO A NOTARY PUBLIC ARE NOT FAIRLY ATTRIBUTABLE TO THE STATE WHEN SHE RECORDS AND TRANSCRIBES DEPOSITION TESTIMONY IN A CIVIL ACTION.

Petitioner argues that because a notary public is licensed by the State, is denominated an "officer" in state statutes and performs important public functions, a notary public is therefore a person who acts under color of state law for puposes of Section 1983. Contrary to such claim, the fact that a person is licensed by the State to conduct a trade or profession or is denominated an "officer" or "official" in a State statute establishing the qualifications of such office or defining such person's duties does not confer upon such person the status of state actor or mean that such person's acts are attributable to the State. Although lawyers are licensed by the States and are often referred to as "officers of the court" they are "not

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[1] "(1) Whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

officials of government by virtue of being lawyers." *In re Griffiths*, 413 U.S. 717,729 (1973). Nor are public defenders who are paid by municipal subdivisions of the State necessarily state actors for purposes of §1983. *Polk County v. Dodson*, 454 U.S. 312 (1981). In *Bernal v. Fainter*, 104 S.Ct. 2312, 2319 (1984), the Court stated, albeit on different issue, that "a notary public's duties, important as they are, hardly implicate responsibilities that go to the heart of representative government. Rather, these duties are essentially clerical and ministerial." The Court has held that the fact that a person or business is licensed or regulated by the state does not make one a person who acts under color of state law or convert his acts into that of the State for purposes of the Fourteenth Amendment. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-177 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974).[2] While licensed by the State, a variety of business activities have been held not fairly attributable to the State for purposes of §1983, including a privately owned public utility, *Jackson*, 419 U.S. 345, a physician, *Sumpter v. Harper*, 683 F.2d 106 (4th Cir. 1982), an insurance company, *Freier v. New York Life Ins. Co.*, 679 F.2d 780 (9th Cir. 1982), and a private attorney, *Dahlberg v. Becker*, 748 F. 2d 85 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 1845 (1985).

Whether a person charged with acting under color of state law is indeed a state actor, turns not only on whether that person's authority derives from the State, but more importantly, on whether the conduct of such person allegedly causing the deprivation of a federal right is "fairly attributable" to the State. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Action by a private party, without more, is not sufficient to justify a characterization of that party as a "state actor." *Id.* at 939. By no stretch of imagination can the alleged malfeasance

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[2] In *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 354, the Court observed: "Doctors, optometrists, lawyers, Metropolitan, and [an] upstate New York grocery selling a quart of milk are all in regulated businesses, essential goods and services 'affected with a public interest.' We do not believe that such status converts their every action, absent more, into that of the State."

of a privately employed stenographer in recording and transcribing depositions in a civil action be acts attributable to the Commonwealth of Pennsylvania. The status of the stenographer as a licensed notary does not elevate the alleged malfeasance of the stenographer into acts for which the Commonwealth would be responsible.[3]

Petitioner cites *Krueger v. Miller*, 489 F. Supp. 321 (E.D. Tenn. 1978), *aff'd*, 617 F. 2d 603 (6th Cir. 1980), for the proposition that a notary public is, for all intents and purposes, a state actor within the reach of 42 U.S.C. §1983. In *Krueger*, the District Court held that a person acts under color of state law when he uses his authority as a notary public and a magistrate to pretend also to possess the authority of a deputy sheriff. 489 F. Supp. at 329. The instant case is clearly distinguishable because, unlike the conduct complained about in *Krueger*, here the privately employed stenographer assigned to take and transcribe deposition testimony did not perform functions which were in any way dependent on state authority, *see Polk County v. Dodson*, 454 U.S. at 318, and she did not pretend to be anyone other than a privately employed stenographer.

C. AN ALLEGED CONSPIRACY AMONG PRIVATE PERSONS, NONE OF WHOM ACTS UNDER COLOR OF STATE LAW, FAILS TO STATE A CLAIM UNDER 42 U.S.C. §1983.

Because Bowes was not a state actor for purposes of §1983, to the extent that Petitioner's claims against Bowes' employer, respondent Geiger and Loria, are predicated upon the theory of *respondent superior*, they are without merit. Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). *See also Polk County v. Dodson*, 454 U.S. at 325.

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[3] If Pennsylvania's licensing scheme for notary publics made Bowes' action that of the State, "then presumably the actions of a lone Pennsylvania cab driver could also be fairly treated as those of the State of Pennsylvania." *cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350 fn. 7.

While private persons who conspire with one who acts under color of state law may be liable under §1983, an alleged conspiracy solely among private persons, none of whom acts under color of state law, fails to state a cognizable, jurisdictional claim under §1983. *Polk County v. Dodson*, 454 U.S. at 315. The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). Since none of the respondents was a person acting under color of state law, Petitioner failed to state a claim under §1983.

## CONCLUSION

Petitioner's Application for a Writ of Certiorari should be denied.

Respectfully submitted,

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